

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA,)

Plaintiff,)

v.)

PABLO FAVELA-CORRAL,)

Defendants.)

4:02CR3121

MEMORANDUM AND ORDER

The defendant seeks a reduction in sentence pursuant to 18 U.S.C. § 3582(c)(2) and Amendment 709 to the Guidelines. (Filing 186.) The motion will be denied for two independent reasons.

First, Amendment 709¹, effective November 1, 2007, came into being long after the defendant was sentenced in 2003,² and it is not listed as one of those amendments that the Sentencing Commission has made retroactive.³ Accordingly,

¹See U.S.S.G. *Supplement to Appendix C*, at 235-241 (amendments to the *Guidelines Manual* effective November 1, 2004, through November 1, 2007) (Amendment 709).

²See filing 115 for the judgment.

³U.S.S.G. § 1B1.10(c) (2008), *reprinted in Supplement to the 2007 Guidelines Manual*, at 2 (May 1, 2008) (policy statement listing amendments that are retroactive). Observe that U.S.S.G. § 1B1.10(a)(2)(A) provides that a “reduction in the defendant’s term of imprisonment is not consistent with this policy statement and therefore is not authorized under 18 U.S.C. § 3582(c) if . . . none of the amendments listed in subsection(c) is applicable to the defendant . . .” *Reprinted in Supplement to the 2007 Guidelines Manual*, at 1.

there is an insuperable statutory bar to relief.⁴ *United States v Peters*, 524 F.3d 905, 906 (8th Cir. 2008) (Amendment 709 was not retroactive and the district court was therefore barred from applying it). Second, since the amendment did not change the way the Guidelines dealt with the crime of driving under the influence (the crime that put that defendant into criminal history category II), Amendment 709 would not help the defendant even if it were retroactive.⁵ Therefore,

IT IS ORDERED that the defendant's motion (filing 186) is denied.

DATED this 10th day of July, 2008.

BY THE COURT:

s/Richard G. Kopf
United States District Judge

⁴Since the Sentencing Commission did not make Amendment 709 retroactive, it would be inconsistent with the "applicable policy statements issued by the Sentencing Commission," and therefore inconsistent with the plain words of 18 U.S.C. § 3582(c)(2), to grant the defendant relief.

⁵*Compare* the presentence report, filing 112, PSR ¶¶ 57, 58 and 61, *with* Amendment 709, U.S.S.G. *Supplement to Appendix C*, at 235-241.